

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the matter of the Appeal by)	SPB Case No. 96-2083
)	
STEVEN L. KINOSHITA)	
)	BOARD DECISION
)	(Precedential)
From ten working days' suspension from the)	
position of State Traffic Officer with the)	NO. 98-05
Department of California Highway Patrol at)	
Los Banos)	July 1 –2 , 1998
_____)	

APPEARANCES: John Markey, Labor Representative/Legal, California Association of Highway Patrolmen, on behalf of appellant, Steven L. Kinoshita. Steven Kaiser, Deputy Attorney General, on behalf of respondent, Department of California Highway Patrol.

BEFORE: Florence Bos, President; Richard Carpenter, Vice President; Ron Alvarado and Lorrie Ward, Members.

DECISION

Appellant, Steven Kinoshita, was given a ten days' suspension by the Department of California Highway Patrol ("CHP") for: (1) leaving his assigned beat without permission or authorization on various occasions to visit a woman; (2) failing to notify the Communications Center ("dispatch") of his status or location during these visits; and (3) improperly recording the time he spent on these visits as time spent on duty-related activities.¹ In its adverse action against appellant, CHP alleged, among other things, that appellant's behavior violated two CHP manuals (collectively, the "Manuals"): Highway Patrol Manual 31.1 - Motor Transport Manual ("HPM 31.1") and

¹ CHP also charged appellant with operating his vehicle unsafely on one occasion by breaking traction and squealing the tires in order to impress the woman he was visiting. The Chief Administrative Law Judge who heard this matter found that this allegation was not proven and, therefore, dismissed it. During oral arguments before the Board, CHP stated that it had dropped this allegation.

Highway Patrol Manual 40.71 - CHP 415 User's Manual ("HPM 40.71"). However, CHP did not delineate in the adverse action which provisions of each of these Manuals appellant's conduct allegedly violated. CHP also did not provide copies of the Manuals to appellant with the adverse action. Appellant contended that these failures constituted violations of the due process protections granted to civil service employees under Skelly v. State of California ("Skelly") (1975) 15 Cal.3d 194.

In her proposed decision, the Chief Administrative Law Judge ("CALJ") found that CHP proved by a preponderance that there was cause for discipline against appellant, but ruled that the just and proper penalty was a five days' suspension. The CALJ also found that CHP's failure to provide appellant with copies of the Manuals was a Skelly violation, but did not award any Skelly damages because she had reduced the penalty to that of a lesser adverse action.

In this decision, the State Personnel Board (the "Board") substantially adopts the CALJ's findings of facts and sustains the CALJ's modification of the penalty to a five days' suspension. The Board also finds that CHP's failure to specify which of the Manuals' provisions appellant's misconduct allegedly breached constituted a violation of the notice requirements set forth in Skelly and determines that the proper remedy is the dismissal of all charges in the adverse action relating to appellant's alleged violations of the Manuals.

BACKGROUND

Appellant's Employment History

In July, 1988, appellant began working as a CHP State Traffic Officer Cadet. On December 1, 1988, he was promoted to a State Traffic Officer. He worked in the San Jose, King City and Hollister areas before being assigned to the Los Banos area,

Central Division, on November 1, 1994. On January 16, 1996, he was temporarily assigned to Central Division Commercial Unit (the “scales”).

Appellant has no prior adverse actions. He received a censurable incident report in August, 1993. He also received a special commendation in September 1993, and commendations in October and December 1995. His 1993, 1994 and 1995 annual performance appraisals rated him as meeting or exceeding performance standards.

The Facts Underlying the Suspension

On February 25, 1996, Central Division State Traffic Sergeant James Lewis (“Lewis”) received a complaint from Susan Gallichio (“Gallichio”) that appellant had sexually assaulted her. Gallichio, an unmarried woman, was then living with State Traffic Officer David White (“White”) in the Los Banos area. Gallichio and White were friends with appellant and his wife.

Over the next two months, Lewis conducted an internal investigation for CHP’s Central Division into Gallichio’s allegations against appellant.² As part of this internal investigation, on April 23, 1996, Lewis and Lieutenant Bill Leist (“Leist”) interviewed appellant.³ During this interview, appellant denied that he had sexually assaulted Gallichio, but admitted that he had visited Gallichio at her home in his

² The Los Banos Police Department also investigated Gallichio’s sexual assault charges. No criminal charges or civil complaints were filed or prosecuted against appellant as a result of Gallichio’s allegations.

³ Appellant did not testify at the hearing before the CALJ. Instead, a copy of the transcript of Lewis and Leist’s interview with appellant was admitted into evidence. Appellant timely objected to the admission of any hearsay evidence included in the admitted exhibit. Pursuant to Government Code § 11513(d), effective July 1, 1997, when there is a timely objection, hearsay evidence alone cannot support a finding of fact, unless it is corroborated or qualifies as an authorized exception to the hearsay rule. Under Evidence Code § 1220, appellant’s admissions during his interview with Lewis and Leist qualify as exceptions to the hearsay rule and, therefore, can support findings of fact under Government Code § 11513(d).

assigned CHP vehicle approximately twice a week from November 1995 through January 1996 while he was on duty. His visits in November and December 1995 lasted about 30 to 45 minutes; his visits in January 1996 lasted between five and twenty minutes. Appellant did not have sexual relations with Gallichio during any of his on-duty visits.⁴

During his interview with Lewis and Leist, appellant stated that he did not notify dispatch of his whereabouts when he visited Gallichio while on duty. He admitted that his failure to notify dispatch violated department policy, and that his visits were not an appropriate use of state time and were too long. Appellant also admitted that he improperly accounted for the time spent on these visits in his daily field records as time spent on the shooting range or working at the scales.

The Central Division's internal investigation concluded that Gallichio's charges of sexual misconduct against appellant were not substantiated, but recommended that appellant be disciplined for visiting Gallichio at her residence while on duty, staying too long during these visits, and failing to notify dispatch of his whereabouts during these visits.

The Preliminary Notice of Adverse Action which accompanied Central Division's internal investigation report recommended that appellant be given a three working days' suspension for his misconduct. Lewis testified that he considered a three working days' suspension to be a fair penalty for appellant's misconduct based upon the penalties that had been given to other State Traffic Officers for similar misconduct in the past.

⁴ Appellant admitted that he had consensual sexual relations with Gallichio twice in January 1996 during off-duty visits.

Lieutenant Michael Ayala (“Ayala”) of the Central Division testified that he conferred with Leist and John Anderson (“Anderson”), Chief of the Central Division, and they agreed that a three to five days’ suspension was the appropriate penalty for appellant’s misconduct. There was no testimony or evidence presented as to who made the decision to increase the penalty from the recommended three days’ to a ten days’ suspension or why the penalty was increased in the final adverse action.

During oral argument before the Board, CHP asserted that the public relations issues surrounding Gallichio’s claims against appellant were a factor in determining the penalty that was imposed. Ayala testified at the hearing before the CALJ that he had spent considerable time and effort to keep Gallichio’s allegations against appellant out of the local newspapers. The adverse action, however, did not charge appellant with the more serious of Gallichio’s allegations.

Skelly Issues

The adverse action charged appellant with, among other things, violating the Manuals. The adverse action, however, did not state explicitly which provisions of the Manuals appellant was alleged to have violated. Appellant was not provided copies of the Manuals as part of the Skelly package when he was served with the adverse action in August 1996. CHP first provided copies of the Manuals to appellant in September 1997, shortly before the hearing before the CALJ. Ayala testified that copies of the Manuals were available to State Traffic Officers in various locations in the CHP office where appellant worked.⁵

⁵ Ayala testified that the HPM 40.71 was located in three different places in the CHP office: the main library, the command library and the officers’ library. HPM 31.1 was located in three different places in the office: the main library, the command library and the sergeants’ library.

DISCUSSION

Legal Causes for Discipline

CHP contends that appellant's misconduct constituted cause for discipline under Government Code § 19572, subdivisions (c) inefficiency; (d) inexcusable neglect of duty; (p) misuse of state property; and (t) other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment.

Inexcusable neglect of duty

For discipline to be sustained under Government Code § 19572(d) for inexcusable neglect of duty, CHP must prove by a preponderance of the evidence that appellant's misconduct constituted "an intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty."⁶

Appellant admitted that: (1) he visited Gallichio twice a week for three months while he was on-duty and stayed too long on these occasions; (2) he improperly failed to account for the duty time he spent in unauthorized visits with Gallichio in his daily field reports; and (3) he did not notify dispatch of his whereabouts during these visits as required by CHP policy. This admitted misconduct constituted inexcusable neglect of duty under Government Code § 19572(d).

Misuse of state property

The charge of "misuse of state property" under Government Code §19572(p) generally implies either the theft of state property or the intentional use of state property or state time for an improper or non-state purpose, often, but not always, involving personal

⁶ Gubser v. Department of Employment (1969) 271 Cal. App. 2d 240, 243

gain.⁷ The Board has held that an employee may be disciplined under Government Code § 19572(p) for using state time and a state vehicle to facilitate a private business arrangement.⁸

In this matter, appellant improperly used his state vehicle while on duty to conduct his personal relationship with Gallichio. Such misconduct constituted cause for discipline under Government Code § 19572(p) for misuse of state property.

Other failure of good behavior

In order justify discipline under Government Code § 19572(t), CHP must show a failure of good behavior on the part of the appellant which is of such a nature as to cause discredit to the CHP or appellant's employment.⁹ For discipline to be sustained under Government Code § 19572(t), it

must be based on more than a failure of good behavior; it must be of such a nature as to reflect upon [appellant's] job... the misconduct must bear some rational relationship to [appellant's] employment and must be of such a character that it can easily result in the impairment or disruption of the public service. . . . The legislative purpose behind subdivision (t) was to discipline conduct which can be detrimental to state service. . . . It is apparent the Legislature was concerned with punishing behavior which had potentially destructive consequences, rather than concentrating upon intentional conduct.¹⁰

Appellant's personal visits to a woman while on duty constituted a failure of good behavior which bears a rational relationship to his employment and is of such a character that it can easily result in the impairment or disruption of the public service. CHP has

⁷ Robert Boobar (1993) SPB Dec. No. 93-21

⁸ Ernest Dale Switzer (1992) SPB Dec. No. 92-14

⁹ Warren v. State Personnel Board (1979) 94 Cal. App. 3d 95, 104.

¹⁰ Stanton v. State Personnel Board (1980) 105 Cal. App. 3d 729, 739-40. (Emphasis in original.)

shown by a preponderance of the evidence that cause for discipline existed under Government Code § 19572(t).

Inefficiency

“Inefficiency” under Government Code section 19572(c) generally connotes a continuous failure by an employee either to meet a level of productivity set by other employees in the same or similar positions, or to produce a result with a minimum of waste, expense or unnecessary effort.¹¹ The evidence did not show that appellant either continuously performed below the level expected of him, or produced substantially less work than his fellow State Traffic Officers. To the contrary, the evidence presented about appellant’s work record indicates that he consistently met or exceeded CHP’s expected standards. The charge of inefficiency under Government Code § 19572(c) is, therefore, dismissed.

Penalty

When performing its constitutional responsibility to review disciplinary actions in accordance with Article VII, section 3(a) of the California Constitution, the Board is charged with rendering a decision that is "just and proper." ¹² To render a decision that is "just and proper," the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the California Supreme Court in Skelly¹³ as follows:

...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in [h]arm to the public service. [Citations omitted] Other relevant factors

¹¹ Robert Boobar (1993) SPB Dec. 93-21, p. 10.

¹² See, Government Code § 19582.

¹³ (1975) 15 Cal.3d 194, 217 – 218.

include the circumstances surrounding the misconduct and the likelihood of its recurrence.

The CALJ found that the harm to the public service from appellant's misuse of on-duty time to conduct a personal relationship, inaccurate completion of time reports and failure to disclose his whereabouts to dispatch was obvious and there was a likelihood of recurrence. She also found that the circumstances surrounding appellant's misconduct did not establish mitigation. In spite of these findings, she reduced the penalty from a ten to a five working days' suspension. In her proposed decision, the CALJ found that this penalty reduction was warranted because the CHP officials most closely affected by appellant's misconduct testified that a three to five days' suspension was the appropriate penalty given the penalties that had been imposed upon other State Traffic Officers who had engaged in similar misconduct in the past.

CHP contends that it was inappropriate for the CALJ to rely upon testimony about other adverse actions against different State Traffic Officers because there was not adequate evidence presented that those other actions were sufficiently similar to the case at hand to offer a fair basis of comparison and the witnesses indicated that they did not know the circumstances which caused CHP to increase the recommended penalty in this case. CHP asks the Board to follow its decision in Timothy J. Green,¹⁴ which held that:

An agency is not required to impose the exact same penalty in every single case involving similar factual circumstances. There are a variety of factors which may influence an agency to take stronger action in one case than it does in another including the length of the employee's service, the underlying circumstances of the offense, and the overall policy of the agency in seeking to deter the misconduct involved. Thus, unless there is a clear pattern among the cases which demonstrates that a particular

¹⁴ (1992) SPB Dec. No. 92-18, at pp. 5-6.

case is clearly outside the scope of the usual agency discretion, such evidence will not be admitted.

In determining what is a "just and proper" penalty for a particular offense under a given set of circumstances, the Board has broad discretion; it is not obligated to follow the recommendation of the employing power.¹⁵ In this case, evidence regarding the penalties imposed by CHP in allegedly similar cases was admitted into the record over CHP's objection. The Board agrees with CHP that, in light of its decision in Timothy Green, it is not bound by CHP's past history regarding penalties. However, consistent with Timothy Green, the Board may consider the level of penalty imposed in similar cases as one of the many factors it reviews when assessing a just and proper penalty.¹⁶

In this case, the level of penalty imposed in similar cases is just one of the many factors that weigh in favor of a penalty reduction. The following other factors also show that a penalty reduction is warranted:

Lewis testified that although Gallichio's residence was not on appellant's beat, it was in his area and only a short distance from appellant's beat. He stated that it was not uncommon for officers to go short distances off their beats for breaks. He also testified that it was not uncommon for officers not to notify dispatch when they went off their beats for short breaks. In light of these factors, in addition to the penalties imposed in similar cases, Lewis concluded that a three days' suspension was a fair penalty for appellant's misconduct.

During oral argument, CHP contended that the recommended penalty was increased in light of the efforts Ayala had to make to keep Gallichio's accusations from

¹⁵ Wylie v. State Personnel Board (1949) 93 Cal. App. 2d 838, 843.

¹⁶ See Frank Bennett (1994) SPB Dec. No. 94-01.

being reported in the local newspapers. Ayala testified that, when he discussed with Anderson and Leist that a three to five days' suspension was an appropriate penalty, Anderson was aware of the efforts Ayala was making to keep local newspapers from reporting about the case. CHP did not mention public relations concerns arising out of the Gallichio allegations as a reason for discipline in the adverse action. CHP has not shown that Ayala's efforts to keep the newspapers from reporting about this matter bear any rational relationship to the determination of what is a just and proper penalty.

CHP called no witnesses and offered no evidence to explain why a ten working days' suspension was a just and proper penalty under the circumstances. The only witnesses whom CHP called were Ayala and Lewis and both of them, on behalf of CHP, testified that they thought a fair penalty for appellant's misconduct was a three to five working days' suspension.

In light of the foregoing considerations and the absence of any evidence in the record to support a ten working days' suspension, the Board agrees with the CALJ that a five working days' suspension is a just and proper penalty for the proven misconduct.

Skelly Issues

Appellant contends that CHP violated his Skelly rights by failing to: (1) specify in the adverse action the provisions of the Manuals he was accused of violating; and (2) provide copies of the Manuals to him when it served the adverse action.

After reviewing the excerpts from the Manuals admitted into evidence during the hearing, the CALJ was unable to discern which provisions of the Manuals appellant's misconduct allegedly violated. The CALJ, therefore, dismissed all charges in the adverse action which alleged violations of the Manuals. Even though she dismissed all

charges alleging violations of the Manuals, the CALJ found that CHP's failure to provide appellant with copies of the Manuals when it served the adverse action constituted a Skelly violation. The CALJ did not award any Skelly damages for this violation given her reduction of the penalty to that of a lesser adverse action.

In Skelly, the California Supreme Court set forth certain notice requirements that a public employer must fulfill to satisfy an employee's pre-removal procedural due process rights:

As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.¹⁷

Pursuant to Skelly, the Board enacted Rule 52.3, which provides, in pertinent part:

(a) Prior to any adverse action . . . the appointing power . . . shall give the employee written notice of the proposed action. This notice shall be given to the employee at least five working days prior to the effective date of the proposed action. . . . The notice shall include:

- (1) the reasons for such action,
- (2) a copy of the charges for adverse action,
- (3) a copy of all materials upon which the action is based,
- (4) notice of the employee's right to be represented in proceedings under this section, and
- (5) notice of the employee's right to respond....

Although the adverse action charged appellant with violating the Manuals, it did not inform him which of the Manuals' provisions he was alleged to have disobeyed. To comply with Skelly and Rule 52.3, CHP, in the notice of adverse action, was required to inform appellant of the charges against him. As stated in Leah Korman,¹⁸ the "right to be notified of the charges is a critical element in due process of law." CHP's failure to

¹⁷ 15 Cal.3d at p. 215.

¹⁸ (1991) SPB Dec. No. 91-04 at p. 4.

notify appellant of the specific provisions of the Manuals he allegedly disobeyed hampered appellant's ability to prepare his defense and made it much more difficult for the CALJ to determine whether the evidence supported the adverse action. CHP's failure to state clearly which provisions of the Manuals appellant allegedly disobeyed violated the notice requirements set forth in Skelly and Rule 52.3. The CALJ properly dismissed all the allegations in the adverse action which alleged violations of the Manuals.

Appellant contends that CHP's failure to provide copies of the Manuals with the adverse action also constituted a Skelly violation. CHP argues that the Manuals were readily accessible to appellant at various places in CHP's offices. Appellant responds that it was not appellant's responsibility to seek out the Manuals; it was CHP's duty to provide them to appellant with the notice of adverse action.

When a state agency alleges in an adverse action that an employee's conduct violated or breached a statute, regulation, rule, policy, procedure, manual, guideline, standard or the like, not only must the agency identify the specific provisions allegedly breached, it must also either: (1) quote the provisions in the adverse action; (2) provide the employee with copies of the provisions as part of the Skelly package; or (3) inform the employee where the provisions may be found. If the state agency chooses the third option, the allegedly violated provisions must be kept readily available in an easily accessible location where the employee works.¹⁹

¹⁹ This requirement applies only to statutes, regulations, rules, policies, procedures, manuals guidelines, standards and the like which apply generally to employees. It does not apply to factual information, documents or materials relevant to a particular case. Copies of all the factual materials relied upon by the individual who makes the ultimate decision to take adverse action against an employee must be provided to an employee at the time the adverse action is served. See Joseph Garcia (1998) SPB Dec. 98-03.

In this case, CHP failed to follow any of these options with regard to the Manuals. However, since the Board has dismissed all the charges in the adverse action relating to the Manuals, appellant's allegations with respect to CHP's failure to provide the Manuals have become moot.

CONCLUSION

For the reasons set forth herein, the Board finds that CHP established that there was cause for discipline against appellant pursuant to Government Code § 19572, subdivisions (d) inexcusable neglect of duty; (p) misuse of state property; and (t) other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment. The Board, however, reduces the penalty from a ten working days' suspension to a five working days' suspension.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The ten working days' suspension taken against Steven L. Kinoshita from the position of State Traffic Officer with the Department of California Highway Patrol at Los Banos is modified to a five working days' suspension.
2. CHP shall pay to Steven L. Kinoshita all backpay and benefits it may owe him as a result of the Board's decision to modify his ten working days' suspension to a five working days' suspension.

This case shall be assigned to the Chief Administrative Law Judge for hearing should the parties not be able to agree upon the amount of backpay and benefits owing to Steven L. Kinoshita.

4. This decision is certified for publication as a Precedential Decision.
(Government Code § 19582.5).”

STATE PERSONNEL BOARD²⁰

Florence Bos, President
Richard Carpenter, Vice President
Lorrie Ward, Member
Ron Alvarado, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on July 1-2, 1998.

Walter Vaughn
Executive Officer
State Personnel Board

[Kinoshita.dec]

²⁰ Member Strock did not take part in this decision.